during the first period of review. See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation Opportunity To Request Administrative Review, 59 Fed. Reg. 23,051. LG Semicon and Hyundai each requested reviews of their imports. Neither petitioner nor the Japanese reseller from which petitioner purchased its DRAMs requested a review of that reseller's imports.

That same fact pattern repeated itself with respect to the second period of review—May 1, 1994, through April 30, 1995. Pet. App. 3a. Petitioner imported merchandise produced by LG Semicon, but which petitioner had purchased from an independent Japanese reseller. Upon entry, petitioner posted estimated cash deposits at the rate of 4.97%. When Commerce published notice of an opportunity to request an administrative review with respect to merchandise entering the United States during the second period of review, see Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review, 60 Fed. Reg. 24,831 (1995), LG Semicon and Hyundai again requested reviews, but neither petitioner nor its Japanese reseller did so.

In 1996 and 1997, Commerce published the final results of its first and second administrative reviews of DRAMs from Korea. See Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review (First Review Final Results), 61 Fed. Reg. 20,216 (1996); Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review (Second Review Final Results), 62 Fed. Reg. 965 (1997). In its first

review determination, Commerce established a dumping margin for LG Semicon of zero percent, and in the second review, Commerce similarly established a dumping margin for LG Semicon of 0.01% (*i.e.*, a *de minimis* margin). 61 Fed. Reg. at 20,222; 62 Fed. Reg. at 968. Because neither petitioner nor its reseller had requested a review of imports from that reseller, sales associated with petitioner's entries of Korean DRAMs were not examined during the review process. Pet. App. 3a-4a.

Both review results were challenged in the Court of International Trade by a domestic interested party, Micron Technology, Inc. Pet. App. 3a. See *Micron Tech., Inc.* v. *United States*, 44 F. Supp. 2d 216 (Ct. Int'l Trade 1999) (challenge to First Review Final Results); *Micron Tech., Inc.* v. *United States*, 23 Ct. Int'l Trade 380 (1999) (same); *Micron Tech., Inc.* v. *United States*, 23 Ct. Int'l Trade 549 (1999) (same); *Micron Tech., Inc.* v. *United States*, 40 F. Supp. 2d 481 (Ct. Int'l Trade 1999) (challenge to Second Review Final Results), aff'd and rev'd in part, 243 F.3d 1301 (Fed. Cir. 2001).

On November 1, 1999, Commerce issued liquidation instructions to Customs concerning DRAMs that had entered during the first and second periods of review. Entries of DRAMs produced by LG Semicon and imported by certain identified importers whose sales were considered during the administrative review were ordered to be liquidated at their company-specific rates. Entries of DRAMs produced by LG Semicon and imported by all other importers were ordered to be liquidated at the cash deposit rates required upon entry. Pet. App. 10a.

3. Petitioner commenced this action in the Court of International Trade on March 13, 2000, invoking the court's jurisdiction pursuant to 28 U.S.C. 1581(i). Peti-

tioner contended that it was entitled to the zero duty rate applied to merchandise produced by LG Semicon pursuant to the administrative review, not the cash deposit rate applied upon entry to merchandise that had been produced by LG Semicon.

The Court of International Trade, relying upon the trial court's opinion in *Consolidated Bearings Co.* v. *United States*, 182 F. Supp. 2d 1380 (Ct. Int'l Trade 2002), rev'd, 348 F.3d 997 (Fed. Cir. 2003), opinion after remand, 346 F. Supp. 2d 1343 (Ct. Int'l Trade), aff'd, 412 F.3d 1266 (Fed. Cir. 2005), held that the challenged liquidation instructions were arbitrary and capricious because Commerce's explanation of those instructions was insufficient. Pet. App. 20a.

4. The court of appeals reversed. Pet. App. 1a-6a. Relying upon the court of appeals' holdings in *Consolidated I* and *Consolidated Bearings Co.* v. *United States* (*Consolidated II*), 412 F.3d 1266 (Fed. Cir. 2005), the court of appeals held that petitioner did not have a statutory right to liquidation at the producer's review rate, and that Commerce had consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate. Pet. App. 6a.

ARGUMENT

The court of appeals correctly held that Commerce's instruction to liquidate petitioner's entries, which were not covered by an administrative review, at the cash deposit rate paid upon entry of the merchandise into the United States was lawful and did not constitute an arbitrary departure from past practice. That decision does not conflict with any decision of another court of appeals or of this Court. Nor are the issues presented in this case, which are unlikely to recur due to revised regula-

tory provisions, of exceptional importance. Further review is therefore unwarranted.

1. Petitioner first contends (Pet. 12-13) that the plain meaning of 19 U.S.C. 1675(a)(2)(c) requires Commerce to grant importers the benefit of the review rate calculated for the producer of the goods they purchase, even if they did not purchase the goods from the producer but instead purchased them from an independent reseller (potentially at different prices than those offered by the producer). Specifically, petitioner contends that because Section 1675(a)(2)(C) states that Commerce's determination in an administrative review shall be "the basis for the assessment of * * * antidumping duties on entries of merchandise covered by the determination," petitioner is necessarily entitled to the benefit of the producer's review, despite the fact that it did not participate in the administrative review and thus its entries were not considered by Commerce in determining the producer's review rate. Pet. 13.

Contrary to petitioner's contention, there is nothing in the statutory language that entitles importers from an unreviewed reseller to the benefit of the producer's rate. In relevant part, Section 1675(a)(2)(C) states that Commerce's determination of a review rate shall apply with respect to "*entries of merchandise covered by the determination.*" *Ibid.* (emphasis added). Petitioner's entries were not "covered by" Commerce's administrative reviews because neither petitioner nor its reseller requested a review of those entries, and the producer, which was unaware of the reseller's sales to the United States, provided no information about petitioner's imports as part of the producer's review. Accordingly, Section 1675(a)(2)(C) is of no benefit to petitioner.

During an administrative review, if one is requested, Commerce analyzes the data related to the particular entity—either the producer or the third-party reseller—whose export of merchandise to the United States was the subject of the request. "If no information about import transactions with a particular reseller is before Commerce during the review, then the transactions of an importer who imports the subject merchandise from that reseller do not fall within the scope of the review." *Consolidated I*, 348 F.3d at 1005.

Commerce has adopted a policy of focusing on the particular exporter in order to ensure that the antidumping duties assessed upon imported merchandise are as accurate and importer-specific as possible. Commerce explained in its 1998 clarification why it would not be appropriate to use a producer's rate for an unaffiliated reseller:

> The longstanding principle behind the Department's assessment policy is that company-specific assessment rates must be based on the sales information of the first company in the commercial chain that knew, at the time the merchandise was sold, that the merchandise was destined for the United States. * * * If dumping is occurring, the company that sets the price of the merchandise sold in the United States is responsible for the dumping, and any importer-specific assessment rate must reflect that company's sales prices to the United States.

Assessment I, 63 Fed. Reg. at 55,362. The Federal Circuit has likewise observed that "[t]he simple fact that one importer imports the same merchandise as another importer does not necessarily lead to the conclusion that they are subject to the same antidumping duties. Be-

cause sales prices vary from exporter to exporter and from time to time, separate entries of the same good may have different duties." *Consolidated I*, 348 F.3d at 1005.

Commerce's policy recognizes that resellers who act independently of the producer may engage in dumping, even if the producer has amended its own sales practices to conform to United States antidumping law. For example, although Hyundai and LG Semicon appear to have altered their pricing practices with respect to sales to the United States such that their own exports to the United States were assessed zero dumping margins in the periods of review at issue here, Commerce has no way of knowing (absent a reseller-specific review) whether petitioner's reseller modified its pricing practices in a similar fashion. The export price at which petitioner's Japanese reseller sold goods to the United States could very well have been below the "normal value" of Korean DRAMs. See *Consolidated I*, 348 F.3d at 1005 (quoting Commerce's explanation that "resellers * * * may be dumping to a greater extent than the party under review"). Without information concerning the reseller's own sales of the subject merchandise, when the reseller is the first party to make a sale for export to the United States, Commerce is unable to calculate a specific rate for that reseller.

Petitioner does not dispute that its reseller could have been engaging in dumping behavior, even if LG Semicon was not. Rather, petitioner argues (Pet. 13-14) that the text of the statute and regulation compel Commerce to afford petitioner the benefit of LG Semicon's rate, even if petitioner's reseller was engaging in its own dumping behavior. Petitioner maintains that, under Commerce's regulation, "Commerce conducts adminis-

trative reviews of [only] two types of foreign parties: (i) producers; and (ii) exporters" and that, because Commerce was requested to review "merchandise manufactured and/or sold" by LG Semicon, the review necessarily encompassed all DRAMs produced by LG Semicon. Pet. 13-14 (citing 19 C.F.R. 351.213(b)(1)). There is no reason, however, why the regulatory phrase "review of [a] specified individual producer[]" in 19 C.F.R. 353.22(a)(1) (1994)[3] must be construed, as petitioner posits, to mean a review of all merchandise manufactured by the producer, as opposed to meaning, as Commerce construes it, all sales by that producer to the United States. See Assessment II, 68 Fed. Reg. at 23,958 ("When the Department conducts a review of a producer, it is conducting a review of that producer's U.S. sales, not the producer's merchandise.").

If anything, the relevant version of the regulation cuts against petitioner's construction. Petitioner contends (Pet. 13) that review can be requested of a producer "(1) in its capacity as an exporter (in which case all entries exported by that party are covered by the determination in the review); (2) in its capacity as a producer (in which case all entries produced by that party are covered by the determination in the review); or, (3) in both of these capacities (in which case all entries either produced or exported by that party are covered by the determination in the review)." The premise of petitioner's characterization of the regulatory framework is that a requester seeking the first kind of review—review of only the producer's own exports—must specify that it wants a review of the producer qua "exporter." See 19

[3] As noted above, see note 2, *supra*, the relevant version of the regulation is that in effect during the period in question, 1994-1996, rather than the current version cited by petitioner.

C.F.R. 351.213(b)(1) (allowing requests for review of "exporters or producers"). But no such request could have been made under the regulations in place in 1994. Those regulations provided for review of "specified individual producers *or resellers*." 19 C.F.R. 353.22(a)(1) (1994) (emphasis added). The term "reseller" was, in turn, defined to mean "any person (*other than the producer*) whose sales the Secretary uses to calculate * * * U.S. price." 19 C.F.R. 353.2(s) (1994) (emphasis added). It would have been impossible, therefore, to request a review of the producer qua "reseller," because, by definition, the producer could not be a reseller.

It follows from the foregoing that if the phrase "review of [a] * * * producer[]" were given the meaning attributed to it by petitioner, the only two choices available under the 1994 regulations would have been to request a rate specific to a particular reseller or request a producer rate that could be claimed by all exporters of that producer's merchandise. Such a regime would have been an open invitation to evasion and abuse. A reseller would have been free to choose its own rate or that of the producer, depending on which rate was lower. A reseller engaging in patently illegal dumping behavior could have done so with virtual impunity, while enjoying a low antidumping rate determined based upon the entirely unrelated terms of the producer's own exports. In contrast, the domestic companies injured by the reseller's dumping behavior could have obtained a reseller-specific rate only if they could identify the responsible reseller, information to which the domestic companies would not necessarily have been privy.

Commerce's view, *i.e.*, that analysis of one series of transactions or entries does not necessarily produce

rates applicable to a wholly separate and distinct series of transactions simply because the merchandise at issue in each was produced by the same company, is fully consistent with the statutory and regulatory provisions. By its terms, Section 1675(a)(2)(C) requires Commerce to apply the final results to those transactions "covered by" the review. The sales practices of the reseller from whom petitioner imports DRAMs were simply not covered by the administrative review in this case. Therefore, petitioner's imports are not within the scope of the final determination of LG Semicon's review rate. Nor does the regulation compel Commerce to treat a review of a producer's own exports to the United States as determining the dumping margin of an unrelated reseller. Because neither the statute nor the regulation compels Commerce to apply the final results of an administrative review to any entries of merchandise that were not covered in the administrative review, petitioner has no entitlement to the antidumping rates which resulted from the administrative reviews of LG Semicon's exports. See *Consolidated I*, 348 F.3d at 1007 ("Commerce's expertise endows it with discretion to determine when and how to implement the final results beyond their literal, statutory scope.") (citing *Nippon Steel Corp.* v. *United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003)).

2. Petitioner also contends (Pet. 15) that Commerce abandoned "its previous policy of ordering liquidation at the manufacturer's rate" when it clarified in 1998 that only exports to the United States through resellers of which the producer was aware would be entitled to the review rate determined for the producer. See Assessment I, 63 Fed. Reg. at 55,362. Petitioner concedes (correctly) that its departure-from-past-practice argument "does not rise to a level justifying review by this Court."

Pet. 15. The issue of Commerce's purported change in practice lacks any continuing significance, as it could only conceivably have relevance to entries that predated the clarification of Commerce's policy.

In any event, there is no need for this Court to independently review the voluminous record concerning Commerce's past practice in that regard. As the court of appeals correctly held, the historical record simply does not support petitioner's claim that Commerce had a consistent practice of affording independent resellers the benefit of the producer's review rate. Pet. App. 6a; *Consolidated II*, 412 F.3d at 1272. To the contrary, to the extent Commerce had a consistent practice, it was to liquidate entries that were not subject to an administrative review at the cash deposit rate (*i.e.*, the deposit rate at the time of entry). *Ibid.*

As demonstrated above, that policy was reflected in Commerce's regulations. Those regulations provided that a request for administrative review should indicate the "specified individual producers or resellers" for which a review was sought, 19 C.F.R. 353.22(a)(1) (1994), and that, if no timely request for a review was received, Commerce would "instruct the Customs Service to assess antidumping duties on the merchandise * * * at rates equal to the cash deposit of, or bond for, estimated antidumping duties required on that merchandise at the time of entry," 19 C.F.R. 353.22(e)(1) (1994). See Antidumping Duties, Final Rule, 54 Fed. Reg. 12,742, 12,757 (1989) (explaining, in the Preamble concerning the operation of Section 353.22(e), that "[i]f no review of *particular entries* is requested, however, the cash deposit rate becomes the 'fixed' rate, and the entries will be liquidated at that rate") (emphasis added).

In *Consolidated II*, the court of appeals concluded, after a careful review of the historical record, that "substantial evidence supports Commerce's determination that it has consistently liquidated unreviewed entries from unrelated resellers at the cash deposit rate." 412 F.3d at 1272; Pet. App. 6a (quoting *Consolidated II*). The record upon which the court of appeals based that conclusion in *Consolidated II* is "substantially the same as that offered by the respective parties in the present case." *Ibid.* There is no warrant for this Court to review that record-intensive determination, especially when, as here, the issue will not arise in future cases in light of Commerce's explicit clarification of its practice.[4]

3. Finally, petitioner's contention (Pet. 15) that Commerce's practice places importers "in a 'catch 22' situation" is without basis and does not warrant review. Petitioner contends (Pet. 15-16) that under the policy imple-

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[4] Petitioner attempts (Pet. 9) to cast doubt on the court of appeals' conclusion by citing two instances in which petitioner maintains that Commerce applied the producer's review rate to imports from an unrelated reseller. *Ibid.* (citing *ABC Int'l Traders, Inc.* v. *United States*, 19 Ct. Int'l Trade 787 (1995), and Commerce's 1997 liquidation instructions for entries during the third period of review for Korean DRAMs). To determine whether the instances cited by petitioner actually were counter-examples would, however, require detailed information about the circumstances of each review. See, *e.g.*, Assessment II, 68 Fed. Reg. at 23,958 (explaining that it was unclear from the Court of International Trade's opinion in *ABC Int'l Traders* whether the producer in that review had "knowledge that the merchandise in question was destined for the United States"). In any event, petitioner could not prevail merely by showing isolated instances in which Commerce reached a different result. Rather, it would have to show a "change from agency *practice*." *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005) (emphasis added). The court of appeals correctly held that petitioner had not satisfied its burden here. Pet. App. 6a (citing *Consolidated II*, 412 F.3d at 1272).

mented by Commerce in 2003 of liquidating exports by unreviewed independent resellers at the "all others" rate, importers are put to the allegedly untenable choice of purchasing merchandise directly from the producer, in order to get the benefit of its rate, or paying the "outdated, artificially high" rate applicable to "all others." As an initial matter, that argument has nothing to do with this case, in which Commerce did not apply the "all others" rate (as it will do in cases subsequent to 2003), but rather the cash deposit rate collected at the time of entry.

In any event, petitioner's argument rests on a fundamentally mistaken premise. Any importer could, at the time of the events at issue here as well as today, request an administrative review of any reseller from which it purchased its merchandise to determine a company-specific dumping margin for that reseller. See 19 C.F.R. 353.22(a)(3) (1994); 19 C.F.R. 351.213(b)(3) (allowing importer to request review of an "exporter or producer * * * of the subject merchandise imported by that importer"). Petitioner was free to request an administrative review of its entries and obtain a rate specific to its own reseller. Petitioner's failure to avail itself of that right provides no justification for further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-918

In The
Supreme Court of the United States

HITACHI HIGH TECHNOLOGIES AMERICA, INC.,

Petitioner,

v.

UNITED STATES AND
MICRON TECHNOLOGY, INC.,

Respondents.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Federal Circuit

BRIEF IN OPPOSITION OF MICRON TECHNOLOGY, INC.

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit ("Federal Circuit") correctly held that certain entries of dynamic random access memory semiconductors ("DRAMs") imported by Hitachi High Technologies America, Inc. ("Hitachi") were not "covered" by the first and second administrative review determinations of the antidumping order on DRAMs from Korea under 19 U.S.C. § 1675(a)(2)(C) and, therefore, were subject to the cash deposit rate paid upon entry when (i) Hitachi purchased its DRAMs from a Japanese reseller unrelated to the Korean manufacturer, (ii) the domestic interested party's requests for reviews of the Korean manufacturer did not encompass the Japanese reseller's pricing practices, (iii) Hitachi failed to request its own reviews of the reseller's pricing practices, and (iv) the Japanese reseller's pricing practices were not actually examined during the first or second administrative reviews.

PARTIES TO THIS PROCEEDING AND RULE 29.6 STATEMENT

The parties to this proceeding are the same as those in the Federal Circuit: Petitioner Hitachi (formerly Nissei Sangyo America, Ltd.), and Respondents, the United States and Micron Technology, Inc. ("Micron"). Micron has no parent company, and no publicly held company owns 10 percent or more of Micron's stock.

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BRIEF IN OPPOSITION OF MICRON TECHNOLOGY, INC.

Micron respectfully opposes the petition for writ of *certiorari* filed by Hitachi to review the judgment of the Federal Circuit. The Federal Circuit deemed that judgment to be non-precedential under Federal Circuit Rule 47.6(b), that is, "one determined by the panel issuing it as not adding significantly to the body of law." For the reasons set forth below, Hitachi's petition should be denied.

I. OPINIONS BELOW

The decision of the Federal Circuit is unpublished, but is reported as *Nissei Sangyo Am., Ltd. v. United States*, No. 04-1469, -1492, 2005 U.S. App. LEXIS 13277 (Fed. Cir. July 1, 2005), *reh'g denied*, 2005 U.S. App. LEXIS 24124 (Fed. Cir. Oct. 18, 2005), *petition for cert. filed*, No. 05-918 (U.S. Jan. 17, 2006). The decision also is attached to Hitachi's petition at Appendix 1a-6a.

The decision of the United States Court of International Trade ("CIT") is unpublished, but is reported at *Nissei Sangyo Am., Ltd. v. United States*, No. 00-00113, 2003 Ct. Intl. Trade LEXIS 103 (Ct. Int'l Trade Aug. 18, 2003), *rev'd*, 2005 U.S. App. LEXIS 13277 (Fed. Cir. July 1, 2005), *reh'g denied*, 2005 U.S. App. LEXIS 24124 (Fed. Cir. Oct. 18, 2005), *petition for cert. filed*, No. 05-918 (U.S. Jan. 17, 2006). The decision also is attached to Hitachi's petition at Appendix 7a-21a.

II. JURISDICTION

The Federal Circuit entered judgment on July 1, 2005, and denied Hitachi's petition for panel rehearing and

rehearing *en banc* on October 18, 2005. (Pet. App. 1a-6a, 22a-23a). Hitachi filed its petition for writ of *certiorari* on January 17, 2006, which was within 90 days of the Federal Circuit's decision denying rehearing. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

III. STATUTES AND REGULATIONS

Pursuant to Rules 15.3 and 24.2, Respondent Micron is satisfied with Petitioner's statement except with respect to Petitioner's citation of certain regulations in the text of the petition. The following regulations apply.[1]

§ 353.2 Definitions. . . .

(k) *Interested party.* "Interested party" means: . . .

(3) A producer in the United States of the like product or seller (other than a retailer) in the United States of the like product produced in the United States;

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[1] The regulations applicable to these proceedings are those in effect before the enactment of the Uruguay Round Agreements Act ("URAA"). The earlier version of these regulations is published in the Federal Register at *Antidumping Duties*, 54 Fed. Reg. 12742 (Dep't Commerce Mar. 28, 1989). The post-URAA regulations, 19 C.F.R. Part 351, apply to "administrative reviews initiated on the basis of requests made on or after the first day of July 1997. . . . Segments of proceedings to which part 351 [*i.e.*, the post-URAA regulations] do not apply will continue to be governed by the regulations in effect on the date the . . . requests were made for those segments. . . . " 19 C.F.R. § 351.701. Commerce initiated the first review on June 15, 1994, *Initiation Of Antidumping And Countervailing Duty Administrative Reviews And Request For Revocation In Part*, 59 Fed. Reg. 30770 (Dep't Commerce June 15, 1994) and the second review on June 15, 1995, *Initiation Of Antidumping And Countervailing Duty Administrative Reviews*, 60 Fed. Reg. 31447 (Dep't Commerce June 15, 1995).

§ 353.22 Administrative review of orders and suspension agreements.

(a) *Request for Administrative Review; Withdrawal of Request for Review.*

(1) Each year during the anniversary month of the publication of an order (the calendar month in which the anniversary of the date of publication of the order or finding occurs), an interested party, as defined in paragraph (k)(2), (k)(3), (k)(4), (k)(5), or (k)(6) of § 353.2, may request in writing that the Secretary conduct an administrative review of specified individual producers or resellers covered by an order, if the requesting person states why the person desires the Secretary to review those particular producers or resellers.

(2) During the same month, a producer or reseller covered by an order may request in writing that the Secretary conduct an administrative review of only that person.

(3) During the same month, an importer of the merchandise may request in writing that the Secretary conduct an administrative review of only a producer or reseller of the merchandise imported by that importer. . . .

(e) *Automatic assessment of duty.*

(1) For orders, if the Secretary does not receive a timely request under paragraph (a)(1), (a)(2), or (a)(3) of this section, the Secretary, without additional notice, will instruct the Customs Service to assess antidumping duties on the merchandise described in paragraph (b) of this section at rates equal to the cash deposit of, or bond for, estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse,